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No. 92-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PONY EXPRESS COURIER CORP.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF FOR SECURITY COMPANIES ORGANIZED FOR LEGISLATIVE ACTION IN SUPPORT

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QUESTIONS PRESENTED

(1) Do the decisions of the Eighth Circuit and the National Labor Relations Board conflict with the purpose and policy of Section 9(b)(3) of the National Labor Relations Act of avoiding divided loyalty, causing the decision below to be appropriate for review by the Supreme Court.

(2) Did the Eighth Circuit and the National Labor Relations Board fail to set out a basis for the departure from the previous legal standard used to determine employee status under Section 9(b)(3), causing the decision below to be appropriate for review by the Supreme Court.

(3) Does the decision of the Eighth Circuit set out a legal standard for determining an employee's status as a guard within the meaning of Section 9(b)(3) which is in conflict with the decision of the Second Circuit in *Teamsters Local 851 v. NLRB (Purolator Courier Corp.)*, 732 F.2d 43 (2d Cir. 1984), thereby causing the decision below to be appropriate for review by the Supreme Court.

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I. OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit ("Eighth Circuit") (Pet. App. A1-A18)[1] is reported at 981 F.2d 358. The decision and order of the National Labor Relations Board ("Board") in the unfair labor practice proceeding (*Id.* at A38-A43) is reported at 306 N.L.R.B. No. 22. The Board's Decision and Direction of Election in the underlying representation proceeding (*Id.* at A21-A37) is unreported.

[1] Hereinafter, Pet. App. ____ shall refer to the applicable page of the Petitioner's Appendix.

II. JURISDICTION

The judgment of the Eighth Circuit was issued on December 10, 1992 (*Id.* at A1-A19). The Petition for a Writ of Certiorari was timely filed on March 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§158(a)(5)

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . .

* * *

§159(b)(3)

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees, other than guards.

IV. INTEREST OF AMICUS

Security Companies Organized For Legislative Action ("S.C.O.L.A.") is an association of employers which provide protection services for their customers, formed for the purpose of

addressing legal and legislative issues affecting the security industry. It is necessary for S.C.O.L.A. to file this *Amicus Curiae* brief because the consistent interpretation of Section 9(b)(3) of the National Labor Relations Act ("Act")[2] in accordance with its purpose and policy is of vital importance to the industry which employs hundreds of thousands of persons who are guards within the analysis applied in the prior decisions of the Board. It is the position of S.C.O.L.A. that the Court of Appeals for the Eighth Circuit and the Board have devised an analysis to determine guard status under Section 9(b)(3) which is in direct conflict with thirty (30) years of decisional authority as well as the purpose and policy of the Act and is an exercise of power by the Board beyond its statutory authority to certify certain collective bargaining units and/or labor organizations. The entire industry, in order to conduct business consistent with the Act with a comfortable degree of predictability, requires the determination of the Supreme Court of the United States to ensure the purpose and policy of the Act is adhered to. If this is accomplished their operations can be conducted and performed as in the past consistent with Section 9(b)(3). This brief is filed upon the consent of both parties.

V. STATEMENT OF THE CASE

On May 1, 1991, a petition for representation was filed by Local No. 120, International Brotherhood of Teamsters, AFL-CIO ("Union") in which the Union sought to represent a bargaining unit consisting of "drivers and dispatchers" working out of the New Brighton, Minnesota facility of Pony Express Courier Corporation ("Pony") (*Id.* at A7). A hearing was held before Region 18 of the Board ("Region") in which Pony contended the employees the Union sought to represent were not "drivers" but "courier-guards", and thus were guards within the meaning of Section 9(b)(3) of the Act, and as these employees were statutory guards, they could not be represented by the Union, because it admits to membership employees other than guards (*Id.*).[3] On

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[2] 29 U.S.C. § 159(b)(3).

[3] The supervisory status of the dispatchers pursuant to Section 2(11) of the Act, 29 U.S.C. § 152(11), was also litigated at the hearing before the Region and in the Eighth Circuit. However, the only issue for which certiorari is sought is the status of the courier-guards under Section 9(b)(3) of the Act.

June 7, 1991, the Region issued a Decision and Direction of Election in which it was found that Pony's courier-guards are not guards within the meaning of Section 9(b)(3) of the Act (*Id.*). Therefore, the Board concluded that it was not prohibited from certifying the Union as the collective bargaining representative of Pony's employees as a matter of law (*Id.*).

On June 20, 1991, Pony filed a timely Request for Review of the Decision and Direction of Election with the Board, which was denied on July 15, 1991 (*Id.*). Subsequently, a secret-ballot election was conducted by the Region in a unit consisting of courier-guards and dispatchers ("Unit") (*Id.*). The Union received a majority of the votes cast in the election, and as a consequence on July 26, 1991, the Union was certified by the Board as the exclusive collective bargaining representative of the courier-guard employees in the Unit (*Id.*).

On October 16, 1991, the Union filed an unfair labor practice charge with the Board alleging that Pony had violated Section 8(a)(1) and (5) of the Act by refusing to bargain with it as the exclusive collective bargaining representative of the employees in the Unit. On October 29, 1991, the Region issued a complaint alleging that Pony had violated Section 8(a)(1) and (5) of the Act (*Id.*). Pony, in its answer, admitted that it had refused to bargain with the Union and pled, as an affirmative defense, the lack of validity of the certification issued by the Board which included other employees with guards as defined in Section 9(b)(3) in the Unit represented by the Union that admits to membership employees other than guards (*Id.*). Thereafter, the Region filed a motion for summary judgment and the Board issued an order transferring the proceedings to itself (*Id.*).

On January 21, 1992, the Board issued its decision granting the motion for summary judgment and found that Pony had violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union (*Id.* at A38-A43). Pony sought review of the Board's decision with the Eighth Circuit and the Board filed a cross-application for enforcement of its order (*Id.* at A8).[4]

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[4] Jurisdiction in the Eighth Circuit was based on Section 10(f) of the Act, 29 U.S.C. § 160(f).

On December 10, 1992, the Eighth Circuit issued its decision granting enforcement of the Board's order (*Id.* at A1-A18). The Eighth Circuit held, in denying Pony's petition for review of the Board's order, that the Board's decision that Pony's courier-guards were not guards within the meaning of Section 9(b)(3) of the Act was supported by substantial evidence in the record as a whole (*Id.* at A14). The Eighth Circuit relied heavily on the Board's legal analysis set forth in its prior decision in *Purolator Courier Corp.*, 300 N.L.R.B. 812 (1990) (*Purolator IV*) (*Id.* at A10-A14).[5] The Eighth Circuit also relied on the Board's conclusions that: the security training given to Pony's courier-guards was "minimal", the cautionary measures taken by the courier-guards were simply "common-sense measures" which would be taken by any driver performing pick up and delivery functions, a few customer items were left in unlocked containers by the courier-guards for pick up by customers, and a memorandum was issued to the courier-guards instructing them to use the term "courier-guard" employee when referring to the position they occupied (*Id.* at A10-A14). The Eighth Circuit held that the *Purolator IV* decision had a rational basis and was consistent with the policy of the Act. Relying on this standard the Eighth Circuit determined that the Board's decision below was supported by substantial evidence viewed on the record as a whole (*Id.* at A10-A14).

VI. STATEMENT OF THE FACTS

Pony is engaged nationwide in the business of providing the secured transportation of valuable commodities (*Id.* at A25). The facility at issue is Pony's New Brighton, Minnesota Branch (*Id.*). Pony holds itself out to the public as an organization which provides the secured transportation of commodities (*Id.*). Pony transports a variety of commodities for customers which require

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[5] The Eighth Circuit in its decision incorrectly refers to this case as *Purolator II* (*Id.* at A10-A14). In *Purolator IV*, the Board held that the test to determine if an individual is a guard within the meaning of Section 9(b)(3) is to determine if the employee's job involves "directly and substantially" the protection of valuable property of the customer.

security and protection, such as, cash letters, securities between financial institutions and savings and loan and mortgage companies, medical and laboratory specimens, Drug Enforcement Administration controlled substances, documents, canceled checks and other commodities of value to customers (*Id.* at A26). Included among Pony's customers are the Federal Reserve Bank, commercial banks, savings and loan institutions, drug wholesale distributors, pharmacies and hospitals (*Id.*).

Pony's courier-guards are uniformed and undergo a comprehensive background investigation prior to hire (*Id.* at A28). Each day when the courier-guards report for duty, they are issued their assignments and route keys (*Id.*). Route keys are used to open secured areas at the customer's premises, including otherwise secured doors, offices and safes (*Id.*). Courier-guards are required to keep their vehicles locked at all times under Pony policy as set forth in the Handbook distributed to the courier-guards and on decals placed on Pony's secure vehicles utilized by the courier-guards (*Id.* at A26-A27).[6] Courier-guards utilize the route keys when making deliveries and ensure that the customer's facility is secure after their departure (*Id.* at 27). In addition, courier-guards are provided access to customer computer security codes to be utilized by them in order to gain access to the customer's premises (*Id.* at 28). The courier-guards must reactivate any such alarm system upon their departure (*Id.* at 28).

Pony's courier-guards owe a duty of loyalty to Pony as a consequence of the trust and confidence placed in them, as evidenced by the duties they perform to enforce rules to protect property on behalf of Pony's customers (*Id.* at A28-A29). The courier-guards' duty to enforce rules to protect the property of Pony's customers is codified in the courier-guard Handbook which establishes security rules and directs courier-guards to "Deter, Detect and Report". These words properly symbolize the duty of the courier-guards to enforce rules to protect

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[6] The fact that courier-guards from time to time fail to perform their duties in this regard is merely a matter of employee performance and discipline, which in no way should detract from the essential function of their position.

customer's valuables, which is the fundamental obligation of the employment relationship.

Courier-guards are trained and obligated as employees of Pony to "Deter" theft and vandalism by would-be bandits by exercising preventative means, such as, locking all customer doors and properly reactivating customer alarm systems, wearing their uniforms and badges and adhering to all customer and Pony security procedures (*Id.*).[7] Additionally, courier-guards are required to remain alert to their surroundings at all times in order to "Detect" any problems (*Id.*). Courier-guards are also obligated and directed to ascertain all details relating to any security breach at a customer's location and immediately contact either Pony management or the local police (*Id.*). Further, courier-guards are obligated as a consequence of the employment relationship, to "Report" any suspicious activity and remain on the customer's premises until the police or authorities arrive, whether the incident involves employees of Pony or other individuals (*Id.*). At this point, the courier-guards are obligated to relay all information and assist in the investigation, whether the situation relates to co-employees, employees of the customers or other persons (*Id.*).[8]

Courier-guard training consists of written instructions and on-the-job training given by Pony supervisors or lead courier-guards, which lasts two to four days (*Id.*). The Pony courier-guards are continually informed, from the inception of their employment, that their duty to enforce the rules of Pony and the customer in order to protect the customer's property and premises is an affirmative duty and a fundamental element of

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[7] For example, wearing a uniform is itself a form of security as it reflects the service provided to the customer and informs the public of the secured nature of the transportation. In short, the public clearly perceives a uniform to denote security, as exemplified by the public's perception of uniformed police contrasted to plain clothes police. This is the difference that Pony seeks to portray.

[8] It is this duty to "Report" activity of co-employees and other persons which distinguishes "guards" from employees under Section 9(b)(3). The duty of loyalty towards the employer must override any duty to co-employees or other persons. Congress precluded the Board under Section 9(b)(3) from certifying labor organizations which represented non-guards from also representing guards because the potential for conflict among employees created a divided loyalty dilemma.

their positions (*Id.*). In short, Pony courier-guards, unlike non-guards, are obligated, as a fundamental element of the employment relationship, to enforce against employees of Pony or other individuals, rules to protect the property of Pony and its customers (*Id.*).

VII. ARGUMENT FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

A. The Decision of the Eighth Circuit is in Direct Conflict with the Purpose and Policy of Section 9(b)(3) of the National Labor Relations Act of Avoiding Divided Loyalty and Grants the Board Power Beyond that Authorized under Section 9(b)(3)

While it is true that the Board generally has the authority to interpret the Act, if a decision is made which runs contrary to the language or the purpose and policy of the Act, the reviewing court must exercise its authority to ensure that the purpose and policy of the Act are effectuated.[9] Here, the Board has exceeded the limitations placed on it by certifying a labor organization contrary to the limitations imposed on it by Section 9(b)(3). The Board and the Eighth Circuit have embraced what is euphemistically called the "direct and substantial" test, which is set out in *Purolator IV*, to determine if an employee is a guard within the meaning of Section 9(b)(3) of the Act. This test is in direct conflict with the purpose and policy of Section 9(b)(3) of avoiding collective bargaining units and labor organizations that represent employees employed to enforce rules to protect property, guards, and non-guard employees, which could potentially create a divided loyalty dilemma for the employee called upon to enforce rules against non-guard co-employees who are in the same bargaining unit or labor organization. By applying an analysis to determine guard status which conflicts with the Act, the Board has exceeded its authority and has ignored the policy Congress sought to fulfill when it enacted Section 9(b)(3).

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[9] *NLRB v. Brown*, 380 U.S. 278 (1965).

Section 9(b)(3), in pertinent part, limits the statutory power of the Board from certifying a labor organization from representing a bargaining unit which, "includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." A situation of divided loyalty can only arise where certain elements of an employment relationship exist between an employer like Pony and an employee employed to enforce rules to protect property of an employer.[10] A situation of divided loyalty, which was proscribed by Section 9(b)(3), is created as the employee responsible for enforcing rules to protect property of an employer or its customer must choose between fulfilling his or her duty of loyalty to his or her employer to enforce rules to protect the property of the employer and its customers and any obligation such an employee would feel toward members of the same labor organization.

The analysis utilized for determining if a situation exists which creates the potential for divided loyalty is not a quantitative analysis which measures the level of security provided by the employer to the customers, as reflected in the newly announced "direct and substantial" involvement test embraced by the Board and the Eighth Circuit. Rather, the historical test, reflected in the Congressional debates on the Taft Hartley Amendment of 1947 and all Board decisions until *Purolator IV*, is an examination of the nature of the employment relationship between the employee and the employee's employer. If a duty to enforce rules to protect the employer's or customer's property or to protect the safety of persons on the employer's or customer's premises exists as an element of the employment relationship, then the employee must be found to be a "guard" within the meaning of Section 9(b)(3).

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[10] *See NLRB v. Brinks, Inc.*, 843 F.2d 448 (11th Cir. 1988); *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5 (2d Cir.), *cert. denied*, 474 U.S. 901 (1985); *Teamsters Local 851 v. NLRB (Purolator Courier Corp.)*, 732 F.2d 43 (2d Cir. 1984); *International Bhd. of Teamsters, Local 344 v. NLRB*, 568 F.2d 12 (7th Cir. 1978); *Drivers, Local No. 71 v. NLRB*, 553 F.2d 1368 (D.C. Cir. 1977); *Fuchs ex rel. NLRB v. Teamsters Local Union No. 671*, 390 F. Supp. 243 (D. Conn. 1975); *Humphrey v. Drivers, Local 639*, 369 F. Supp. 730 (D. Md. 1974).

It is because of these employment obligations to the employer, as reflected in Section 9(b)(3), that such employees are insulated from being included in bargaining units with non-guard employees and/or being represented by non-guard labor organizations such as the Union.

Herein, to certify the Union as the representative of the Unit is to effectively negate the undisputed obligations of the courier-guard on behalf of Pony and its customers to "Deter, Detect and Report". This would require either that Pony abolish the guard duties which are fundamental to its business and its customers, thereby completely restructuring Pony as a business entity, or that Pony continue to have its employees be called upon to enforce rules to protect the property of Pony or its customers against non-guard employees who would now be fellow members of the same labor organization. It is precisely this situation of divided loyalty that is proscribed by Section 9(b)(3).

Further, the viability and operation of the security industry depends on a consistent determination in accordance with the policy of avoiding the divided loyalty dilemma. If the service envisioned by the security industry, in accordance with the policy of Section 9(b)(3), is to be achieved, a consistent analysis in accordance with the policy of Section 9(b)(3) must be maintained. Since the enactment of Section 9(b)(3) of the Act in 1947, the decisions of the Board, until the decision in *Purolator IV*, correctly reflected the purpose and policy of the Act by inquiring into the fundamental elements of the employment relationship, without unnecessary emphasis on the indicia of the level of security provided by the employee. With regard to the current application of Section 9(b)(3) to courier-guards, the Board and the Eighth Circuit have completely deviated from the clear purpose and policy of Section 9(b)(3) of avoiding situations of divided loyalty, and in essence, have intruded into the province of Congress by legislating courier-guards to be non-guards, when such was rejected by Congress as late as 1986.[11]

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[11] *Redefining of The Term Guard*, Hearing Before the Subcommittee on Labor, S. Hrg. 99-696, 99th Cong. 2d Sess. 87 (April 24, 1986); *See also*, H.R. Rep.

(Footnote continued)

The central purpose and policy of Section 9(b)(3) of avoiding the potential for divided loyalty, by precluding employees who enforce rules to protect an employer's property and/or safety of persons on the employer's premises from being represented by labor organizations which represent non-guard employees, is highlighted by a historical examination of the decisions of the Board and the courts regarding the scope of Section 9(b)(3). An analysis of the caselaw interpreting Section 9(b)(3) clearly demonstrates that the only factor which is relevant to determine an individual's status as a guard under 9(b)(3) is whether a duty exists to enforce rules to protect property as a consequence of the employment relationship. If such a duty exists, an examination into how the duty is effectuated by the employee - firearms - physical force - reporting, is unnecessary, and is in fact contrary to the purpose and policy of Section 9(b)(3).[12] As security levels may change based upon the value of the commodity, the customer's preference, or use of force by bandits, the level of security effectuated by the employee is not the *sine qua non* of guard status. Rather, the determining factor is the obligation of the employee to *enforce rules* to protect property and the resulting divided loyalty dilemma which results if such a duty is present.[13] The Board and the Eighth Circuit have ignored this basic element and have entered into evaluating "security", for

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No. 245, 80th Cong. 1st Sess. 16 (1947); H.R. Rep. No. 3020, 80th Cong. 1st Sess. 992 (12)(b) (1947); H.R. Rep. No. 3904, 94th Cong. 1st Sess. (1975); H.R. Rep. No. 8410, 95th Cong. 1st Sess. 554 (1977); H.R. Rep. No. 2197, 98th Cong. (1983); H.R. Rep. No. 3560, 100th Cong. 1st Sess. (1987); *See* generally 93 Cong. Rec. 6444, 6601, reprinted II NLRB Legislative History of Labor Management Relations Act, 1947 (1948).

[12] The Board's and Eighth Circuit's analysis is fundamentally flawed as it weighs how security is provided (e.g., armed or unarmed), and essentially concludes that in order to be a guard, the employee must "protect the property". Rather, the language of Section 9(b)(3) specifically provides that an employee needs only to "enforce rules to protect property". The Board and the Eighth Circuit have essentially removed "enforce rules" from the language of Section 9(b)(3), and in doing so have ignored thirty (30) years of decisional authority.

[13] *B.P.S. Guard Servs. Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991); *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 329 (8th Cir. 1987). *See also NLRB v.*

(Footnote continued)

which they have absolutely no expertise. The caselaw set forth below indicates that it is clear that indicia of the level of security provided does not determine an employee's status as a guard under Section 9(b)(3).

It has been well established that whether an employee is armed or unarmed is irrelevant to an employee's status as a guard under Section 9(b)(3).[14] If a duty to enforce rules to protect the property of an employer or its customers exists, the Board has historically found guard status under Section 9(b)(3). In fact, to draw a distinction as to guard status based on the use of firearms would be patently unreasonable, for an unarmed employee possesses the same duty to enforce rules to protect property of an employer as an armed employee, and the fact that the employee is unarmed while enforcing rules protecting the property only results in a more dangerous duty potentially falling on the employee to fulfill the obligation to enforce rules to protect the property. Indeed, as Pony concluded "Deter, Detect and Report" will accomplish the identical goal of enforcing rules to protect property as effectively as arming its courier-guards. The Board's conclusion in *Purolator IV* is contrary to this principle and thus is in error.[15]

Additionally, it is immaterial that the property being protected belongs to another employer, as the Board has consistently held that individuals are guards who have a duty to enforce rules to protect the property of *other* employers, because an employment

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Brinks, Inc., 843 F.2d at 453 (Judicial decisions have also emphasized that the potential for divided loyalty was the primary concern when Section 9(b)(3) was enacted. The Eleventh Circuit noted that the broad language used by Congress in Section 9(b)(3) encompasses not merely divided loyalties which could occur at a company plant, but also the potential for divided loyalty that could arise whenever a guard is called upon to enforce the rules of his employer against any fellow union member).

[14] *Broadway Hale Stores, Inc.*, 215 N.L.R.B. 46 (1974); *Wackenhut Corp.*, 196 N.L.R.B. 278 (1972); *Crumley Hotel, Inc.*, 134 N.L.R.B. 113, 121 (1961); *Western Electric*, 85 N.L.R.B. 563 (1949), *modified*, 87 N.L.R.B. 183 (1949).

[15] Indeed in a decision subsequent to *Purolator IV*, the Board inconsistently held that guard status would be afforded unarmed employees who make "periodic rounds of the plant, punching security clocks of various stations and opening plant offices and gates with keys." *M.K. Morse Co.*, 302 N.L.R.B. 147 (1991).

relationship existed requiring employees to enforce rules to protect property. For example, in *Burns Electronic Security Services, Inc.*, 256 N.L.R.B. 860 (1981), the Board held that unarmed employees who merely monitored alarms at other employers' premises and reported any activity to the proper authorities were guards within the meaning of Section 9(b)(3), because the unique employment relationship designed to enforce rules to protect property of an employer existed. Moreover, the Board in *MGM Grand Hotel*, 274 N.L.R.B. 139 (1985), held that employees, whose sole responsibility was to stay in a room and monitor fire prevention and alarm systems, were guards within the meaning of Section 9(b)(3), despite the fact that the individuals did not leave the room and simply notified security if a problem arose. The Board so held because the employment relationship created a duty to enforce rules to protect property, as envisioned by Section 9(b)(3).

The amount of time an employee spends performing guard duties is likewise not dispositive in determining whether an individual is a guard within the meaning of Section 9(b)(3). The analysis is not quantitative; so long as a duty exists to enforce rules to protect property, the Board has historically found an employee to be a guard within the meaning of Section 9(b)(3). In *Walterboro Manufacturing Co.*, 106 N.L.R.B. 1383 (1953), the Board held that employees who spent only 25% of their time enforcing rules to protect property, spending the rest of their time performing ordinary maintenance work, were guards within the meaning of Section 9(b)(3). Likewise, in *Raymond Metal Products*, 223 N.L.R.B. 127 (1976), the Board held that clerks who substituted for guards only 25% of their time, were still guards.[16] In the end, the purpose and policy of Section 9(b)(3) requires that an employee be found to be a guard where a duty to enforce rules to protect property exists, which necessarily creates the potential for a divided loyalty.

Further, the Board has long held that an employee need not perform duties at a stationary facility in order to be found a guard under Section 9(b)(3). In 1953, the Board held in *Armored Motor Services Co.*, 106 N.L.R.B. 1139 (1953), that armored car guards are guards within the meaning of Section 9(b)(3), because

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[16] *See also A.W. Schlesinger Geriatric Center*, 267 N.L.R.B. 1363 (1983); *Reynolds Metals Co.*, 198 N.L.R.B. 120 (1972).

they possess a duty to their employer to enforce rules to protect property. The Board has continued to adhere to this policy because of the potential for a conflict of loyalty.[17] The fact that armored car employees work out of a vehicle is not determinative. What is determinative is the fact that these types of employees are guards because they have the duty on behalf of their employer, envisioned by Section 9(b)(3), to enforce rules to protect the property of their employer and its customers, so that a divided loyalty could exist between the armored car guards and the employees of the employer whose property they are protecting when they are delivering the valuables.[18] When Congress enacted Section 9(b)(3) it precluded the Board from certifying certain bargaining units and labor organizations precisely to avoid such divided loyalties.

In accordance with the foregoing analysis, the Board has historically held that courier-guards are statutory guards because they have, as a consequence of their employment relationship, the duty to *enforce rules* to protect property of their employer and its customers. The Board in the instant matter, contrary to this historical analysis, has placed unnecessary emphasis on the fact that a courier-guard's vehicle was not always secured, despite the fact that the potential for a divided loyalty still exists. The Board in *Brinks, Inc.*, 226 N.L.R.B. 1182 (1976), held that unarmed courier-guards were statutory guards because they possessed the duty to enforce rules to protect property. The Board continued to hold that pursuant to Section 9(b)(3), courier-guards were guards within the meaning of Section 9(b)(3) in *MDS Courier Service Inc.*, 248 N.L.R.B. 1320 (1980), and in a series of

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[17] *See Dunbar Armored Express Inc.*, 211 N.L.R.B. 687 (1974). *See also NLRB v. Brinks, Inc.*, 843 F.2d at 453.

[18] *Wells Fargo Armored Service Co.*, 270 N.L.R.B. 787 (1984), *enforced*, 755 F.2d 5 (2d Cir.) *cert. denied* 474 U.S. 901 (1985). The Second Circuit held, "the Board and reviewing courts have consistently found that although in enacting Section 9(b)(3) Congress may have focused primarily on the particular situation in *Jones & Laughlin*, the broad language which it chose to use encompasses not only merely divided loyalties at a company plant, but the potential for divided loyalty that arises whenever a guard is called upon to enforce rules of his employer against any fellow union member."

Purolator cases.[19] The Board, as well as the Court of Appeals for the Second Circuit, in these Purolator cases, found the courier-guards to be statutory guards placing emphasis on the duty these employees possessed to enforce rules to protect property and the consequential creation of the divided loyalty dilemma. Any minor variations in security training, security clearance and other secondary considerations were not found controlling.

In 1990, in its decision in *Purolator IV*, the Board departed from the interpretation of Section 9(b)(3), upon which the entire security industry had structured its affairs, holding that the existence of a duty to enforce rules to protect property, as a consequence of the employment relationship, was not the controlling factor in determining an employee's status under 9(b)(3). In *Purolator IV*, the Board ignored the employment relationship, which included a duty to enforce rules to protect property and the resulting divided loyalty dilemma, and substituted its views regarding levels of security as the *sine qua non* of guard status. The Board announced its "direct and substantial" test, which changed the analysis to a cumulative examination of secondary security factors, thus disregarding the language of Section 9(b)(3) relating to the duty "to enforce rules". This analysis effectively eliminates the goal of Section 9(b)(3) to avoid divided loyalty. By embracing this test, the Board lost focus of the purpose and policy of Section 9(b)(3), because the new analysis places the entire emphasis on how security is effectuated to determine guard status, not whether the duty to *enforce rules* to protect the property of an employer exists. In short, the Board commenced up the "slippery slope" of evaluating the security an employer provides its customers by ascertaining if any "police type functions" exist, while ignoring that guard status is solely a result of the existence of an employment relationship which includes a duty to enforce rules to protect property. Simply put, guard status has nothing to do with the various methods upon which security is accomplished, which varies from situation to situation, customer to customer.

The Eighth Circuit, by upholding the Board in the instant matter, holding that the analysis should be whether the employees

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[19] *Purolator Courier Corp.*, 266 N.L.R.B. 384 (1983), *enforced*, 732 F.2d 43 (2d Cir. 1984) (*Purolator III*); *Purolator Courier Corp.* 265 N.L.R.B. 659 (1982) (*Purolator II*); *Purolator Courier Corp.*, 254 N.L.R.B. 599 (1981) (*Purolator I*).

are "engaged directly and substantially in the protection of customer property", has similarly missed the mark, and has incorrectly placed the emphasis on relatively unimportant secondary indicia of how security is effectuated to determine guard status.[20] The result in the instant matter illustrates the inherent flaw in such an analysis.[21] Here, it is undisputed that the courier-guards employed by Pony have an affirmative duty to enforce rules to protect the property of Pony and its customers. This duty of loyalty is appropriately expressed in the words "Deter, Detect and Report". Applying a test which examines if the employees are engaged "directly and substantially" in the protection of property, results in an analysis of the level of security and non-determinative secondary factors, such as, whether an employee

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[20] Any argument that Pony is precluded from questioning the soundness of the decision in *Purolator IV*, because it failed to raise this argument before the Board, is entirely without merit. Pony raised, as an affirmative defense to the Region's motion for summary judgment, the lack of validity of the Region's certification. In proceedings at this stage, pleading an affirmative defense was the only procedure available to Pony, and as the Board granted the Region's motion for summary judgment, Pony was denied the opportunity to raise, as a defense, an attack on the validity of the *Purolator IV* decision in a post hearing brief to an Administrative Law Judge or to the Board. Further, when the case was before the Region, in the forum of a pre-election hearing, there was no reason to argue the validity of the *Purolator IV* decision because the pre-election hearing is a non-adversarial fact-finding proceeding and the *Purolator IV* decision was not brought into the context until the Regional Director's Decision and Direction of Election. The Board denied Pony's Request For Review of this Decision. In any case, the Eighth Circuit considered Pony's argument regarding the soundness of the *Purolator IV* decision. *See also Brinks, Incorporated of Florida*, 276 N.L.R.B. 1 (1985) (where the Board held that Brinks could not be precluded from raising the issue of the guard status of employees in question in an unfair labor practice proceeding when it failed to raise the issue in a prior representation hearing, solely because the statutory issue of guard status constitutes special circumstances).

[21] The lack of validity of any argument that the "direct and substantial" test adopted by the Board and the Eighth Circuit is not a deviation from the prior standard used by the Board and the courts is illustrated by the simple fact that the Board by applying this new test found courier-guards not to be statutory guards where it had in the past held that such individuals were in fact guards within the meaning of Section 9(b)(3). *MDS Courier, supra*.

is called upon to use force in order to protect property, the amount of "official" training given to the employees, and/or the amount of time spent performing guard duties. The above ignores the one determinative factor, whether as a consequence of the employment relationship, a duty exists to *enforce rules* to protect property, which if an individual was called upon to enforce against non-guards in the same labor organization would create a divided loyalty. This is the essence of Section 9(b)(3).

To assert, as the Eighth Circuit does, that any pickup and delivery drivers would take the same precautionary procedures as the courier-guards is simply unfounded, as ordinary drivers are under absolutely no duty to enforce rules to protect the property of their employer's customers.[22] They are required only to pick up or deliver their loads. There is absolutely no affirmative duty placed on "regular" pickup and delivery drivers during transit or upon arrival at the destination to enforce rules to protect the property they are transporting. The comparison is simple, courier-guards have an affirmative duty to enforce rules to protect the property of customers while it is in their custody, while "ordinary" pickup and delivery drivers have absolutely no such duty.[23] To permit the courier-guards to be in the union which admits to membership persons other than guards, such as drivers, would surely create a risk of divided loyalty, as courier-guards are plainly charged with an affirmative duty to protect the property of customers against other individuals. This duty could easily conflict with obligations the courier-guards may have to, or feel towards, "regular" drivers who are fellow union members. It is clear that the "direct and

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[22] Indeed, the Second Circuit rejected such an oversimplification in *Truck Drivers Local 807 v. NLRB*, *supra*.

[23] The Eighth Circuit's reliance on Pony's memo which instructed employees to refer to the courier-guards as "courier-guards" to support a finding that they are not statutory guards clearly reflects a misunderstanding of the law and of Pony's intent. While the job title is certainly not determinative of an individual's status as a guard under the Act, it follows that directing employees to use such a title does not determine their status. Further, the direction of employees to use a certain job title actually denotes an intention of Pony to comply with Section 9(b)(3) and emphasize to employees that they are not just expected to be "couriers" but *courier-guards*, thus emphasizing the duty to enforce rules to protect property.

substantial" test adopted by the Board and the Eighth Circuit is a complete deviation from the standard previously applied by the Board and the courts and is contrary to the purpose and policy behind Section 9(b)(3), for it fails to assess the divided loyalty dilemma. Further, by adopting this test, the Eighth Circuit has allowed the Board to ignore the fundamental distinctions in the language of the Act and thus to exceed the restrictions placed on it by virtue of Section 9(b)(3), because it has failed to recognize that Section 9(b)(3) does not require that a guard "protect property". Rather, Section 9(b)(3) requires that a guard "enforce rules to protect property". Therefore, based on the foregoing, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

B. The Eighth Circuit Failed to Set Out a Basis for its Departure from the Previous Legal Standard Utilized to Determine Guard Status under Section 9(b)(3)

In addition to the above, the integrity of the administrative process requires that the Board and the Eighth Circuit explain the basis for their deviation from the long established history of the caselaw interpreting the language of Section 9(b)(3).[24] Here, the Board and the Eighth Circuit have provided no rational explanation regarding their complete deviation from the consistent interpretation of Section 9(b)(3), that guard status under Section 9(b)(3) will be found where a duty *to enforce rules* to protect property exists. If such a duty exists, the divided loyalty dilemma is created, which in accordance with the purpose and policy of the Act must be avoided. It is well established that the courts may not accept appellate counsels' post hoc rationalizations for agency action.[25] Therefore, it is respectfully requested that the Petition for a Writ of Certiorari be granted because a basis for the deviation from established law and policy has not been established.

C. The Decision of the Eighth Circuit is in Direct Conflict with an Earlier Decision of the Second Circuit which Held that Courier-Guards are Guards within the Meaning of Section 9(b)(3)

The Second Circuit's decision in *Teamsters Local 851 v. NLRB (Purolator Courier Corp.)*, 732 F.2d 43 (2d Cir. 1984), is in direct

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[24] *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *NLRB v. Metropolitan Ins. Co.*, 380 U.S. 438 (1965). *See NLRB v. Brown*, 380 U.S. 278; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). *See* n. 10 *infra*.

[25] *Metropolitan Ins. Co., supra*.

conflict with the decision of the Eighth Circuit in this case, and thus pursuant to Rule 10.1(a), Rules of the Supreme Court of the United States, the Supreme Court should exercise its discretion and grant the instant Petition for a Writ of Certiorari. The Second Circuit in *Teamsters Local 851* held that the Board's finding that Purolator's courier-guards were guards comported with the statutory language and the legislative history of Section 9(b)(3), noting that the Board's interpretation has been consistent for thirty (30) years. The Second Circuit has embraced the standard that has been urged herein as the appropriate standard for determining guard status, which is that the purpose and policy of Section 9(b)(3) and the legislative history require a finding of guard status where the employment relationship creates a duty to *enforce rules* to protect the property of the employer or its customers.

The Second Circuit's decision and the Board's historical standing are clearly in direct conflict with the Eighth Circuit's "direct and substantial" analysis which emphasizes the level of security and omits the directives of Section 9(b)(3), all of which is at the expense of the purpose and policy behind Section 9(b)(3) of avoiding the divided loyalty dilemma.[26] This conflict in the Circuits must be reconciled, for an entire industry of security companies providing security and secured transportation throughout the United States needs a clear and consistent standard regarding the interpretation of Section 9(b)(3) in order to do business.[27] Any argument that the Second Circuit would hypothetically reach the same decision as the Eighth Circuit on the facts present in the instant matter is clearly without merit. The only relevant point of inquiry is to determine if the Circuits have adopted analyses which are clearly in conflict, as are the standards laid down by the Eighth and Second Circuits.

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[26] Indeed, the Eighth Circuit's decision is also in direct conflict with other Circuits regarding the intent of Section 9(b)(3), as reflected in the critical inquiry into the existence of the divided loyalty dilemma. *See NLRB v. Brinks, Inc., supra; Truck Drivers Local 807 v. Brinks, supra.*

[27] In fact, many security companies do business across the entire country; therefore, a clear consistent national standard is necessary in order for these companies to comport their operations with the law.

If two legal standards have been set down which are substantially different, as the standards of the Eighth and Second Circuits are, the standards must be reconciled, regardless of any distinction in the facts in the cases. Further, this issue is of first impression and is of national concern due to the great influence the security industry has on interstate commerce. Therefore, the risk is significant that interstate commerce could be severely impeded if the proscribed divided loyalty was allowed to exist, contrary to the purpose and policy of the Act.[25] Finally, there is no question that this issue will continue to arise as it has done in the past, and without any clear standard, security enterprises which employ employees charged with the duty to enforce rules to protect property will not know whether non-guard labor organizations may represent their employees, which will create labor strife. Thus, the divided loyalty Section 9(b)(3) sought to eliminate will be permitted to exist, contrary to the purpose of policy of the Act, as set forth in Section 9(b)(3).

VIII. CONCLUSION

For the foregoing reasons, it is respectfully requested that a Writ of Certiorari should be issued to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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[25] 29 U.S.C. § 151.